(8)

No. 95-1201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

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QUESTION PRESENTED FOR REVIEW

WHETHER IN AN ACTION TO ENJOIN A CHANGE FROM DISTRICT TO AT-LARGE JUDICIAL ELECTIONS THAT HAS NOT BEEN PRECLEARED PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT, A DISTRICT COURT HAS THE AUTHORITY TO ORDER IMPLEMENTATION OF THE UNPRECLEARED CHANGE AS A COURT-ORDERED PLAN.

List of All Parties in Lower Court Proceedings

The following is a list of all the parties to the proceeding in the Court whose interlocutory order is under review:

Appellants:

Vicky M. Lopez, Crescencio Padilla, William A. Melendez, and David Serena. [Jesse G. Sanchez, a plaintiff in the action filed below, passed away prior to the filing of this appeal by the Appellants. Appellants will be amending their complaint to remove Jesse G. Sanchez as a plaintiff in this action.]

Appellees:

Monterey County, California and the State of California.

Intervenor-Appellee

Stephen A. Sillman.

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No. 95-1201

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WILLIAM A. MELENDEZ, and DAVID SERENA,
Appellants,

v.

MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees,*

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BRIEF FOR APPELLANTS

OPINIONS AND ORDERS BELOW

This appeal seeks to review the Order Modifying Injunction filed by the United States District Court for the Northern District of California on November 1, 1995. The November 1, 1995, Order is not reported and is reprinted in the Joint Appendix (hereinafter cited as Jt. App.). Jt. App. 165.

The Order modified a previous Order filed on December 20, 1994, which enjoined elections to the Monterey County Municipal Court District except for a special election held on June 6, 1995. Jt. App. 123; 871 F.Supp. 1254 (N.D.Cal. 1994).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253 to review the November 1, 1995, Order. The November 1, 1995, Order was entered on November 9, 1995. The district court denied Appellants' Motion for Reconsideration on November 30, 1995. Jt. App. 184. The notice of appeal was filed on November 30, 1995. Appellants' Jurisdictional Statement Appendix 26 (hereinafter cited as J.S. App.); 28 U.S.C. § 2101(b).

STATUTORY PROVISIONS FEDERAL REGULATIONS

42 U.S.C. § 1973c. *See* J.S. App. 85.

28 C.F.R. § 51.54(b). *See* J.S. App. 87.

STATEMENT OF THE CASE

Introduction

This case involves an appeal from a district court order to implement an election plan that has not been approved pursuant to Section 5 of the Voting Rights Act and which Monterey County admitted could not be approved because it was retrogressive.

Plaintiffs, who are Latino voters of Monterey County, California, filed this action on September 6, 1991. Jt. App. 27.

The case seeks injunctive relief against implementation of a voting change from district to at-large, countywide election of municipal court judges without the preclearance required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

Monterey County, California ("County"), is a political subdivision subject to the Section 5 preclearance provisions. The County became subject to Section 5 on November 1, 1968. 28 C.F.R. Appendix to Part 51. Section 5 requires the County to secure an administrative ruling from the United States Attorney General or a declaratory judgment from the District Court for the District of Columbia that a covered voting change does not have the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c. Such a voting change cannot be used in any elections until Section 5 approval is secured. *Clark v. Roemer*, 500 U.S. 646, 652 - 653 (1991).

The three-judge court[1] initially held that a series of voting changes, consisting of county ordinances which consolidated municipal court districts and justice court districts into one countywide municipal court district,[2] were subject to the Section 5 preclearance provisions but had not received Section 5 approval. J.S. App. 47 - 59. The consolidation ordinances reduced the number of election districts containing

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[1] Actions to enforce Section 5 require the convening of a three-judge court. 42 U.S.C. § 1973c.

[2] An amendment to the California Constitution abolished justice court judgeships and their functions were transferred to municipal court judgeships. Article VI, § 5 (b), California Constitution.

a majority of Latino eligible voters from three[3] to zero (the County contained a 17% Latino eligible voter population, J.S. App. 91). Subsequently, the County sought judicial preclearance from the District Court for the District of Columbia. *Monterey County v. United States*, Civ. Act. No. 93-1639 (D.D.C. filed August 10, 1993). The action was voluntarily dismissed after the County acknowledged that it was not able to demonstrate, as required by Section 5, that several of the ordinances did not have a retrogressive effect on Latino voting strength. Jt. App. 125 - 126.

After repeated efforts by the County and Appellants to secure court approval of a proposed election plan, Jt. App. 126 - 127, the district court ordered the County to implement a previously submitted division election plan in a special judicial election to be held on June 6, 1995. Jt. App. 137. Under the division plan, there continued to be a single countywide municipal court. Jt. App. 133. However, judges would be elected from four divisions, two of which had a majority of Latino eligible voters. Jt. App. 126 - 127. The division plan received Section 5 approval from the Attorney General. J.S. App. 53 - 55. As a result of appointments by Governor Wilson and the special election, for the first time in the history of the County, two Latino judges now serve on the municipal court. J.S. App 111. The terms of the judges elected in the special judicial election will expire in January 1997. Jt. App. 137.

On November 1, 1995, without the benefit of an evidentiary hearing, the district court decided that the division

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[3] Prior to the consolidations, the district plan in effect in 1968 provided for three districts with a majority of Latino eligible voters. Jt. App. 129; Intervenor-Appellee Stephen A. Sillman's Motion to Dismiss or Affirm ("Intervenor Sillman's App.") Appendix 50a.

plan's constitutionality was in doubt and consequently, issued an Order reverting to a countywide election for municipal court judges. Jt. App. 165 - 173. The district court's Order results in the implementation of an at-large election system which has not received Section 5 preclearance. The district court's Order is contrary to this Court's precedent in *Clark* and should be reversed.

Relevant Facts[4]

The County, according to the 1990 Census, had a 34% Latino population, J.S. App. 94, and a 17% Latino eligible voter population. J.S. App. 91. From 1980 to 1990, the Hispanic Origin population growth rate was 59.1% while the white non-Hispanic population growth rate was 7.3%. J.S. App. 94. This Hispanic Origin population is geographically concentrated in the eastern part of the City of Salinas, the Castroville-Pajaro Valley north county area, and the south county area which includes the Cities of Gonzales, Soledad, Greenfield, and King City. J.S. App. 95.

The socioeconomic status of the Latino population in the County hinders their ability to effectively participate in the political process. J.S. App. 99 - 103. In 1990, Latinos constituted only 19% of persons over the age of 25 years who completed four years of high school and only 5% of those persons who had a bachelor's degree. J.S. App. 99 - 100. Approximately 92% of the total civilian force was employed, while only 27% of the Hispanic Origin labor force was employed in 1990. J.S. App. 101. Latinos also experience higher poverty rates. For 1990, 12% of the total population in the County was below the poverty level, while the comparable figure for Latinos

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[4] All of the facts highlighted in this subsection were the subject of stipulations between Appellants and the County.

was 21%. J.S. App. 101. The mean income in 1989 for Hispanic Origin households ($ 32,233) was significantly less than the figure for all households in the County ($ 43,185). J.S. App. 102. As to English language skills in 1990, there was a significant number of Latinos five years and over who spoke Spanish at home and did not speak English well or at all (31,432) and a smaller number (29,636) who were classified as linguistically isolated. J.S. App. 102. Overcrowding also is a serious issue as the total number of persons per occupied housing unit for the County was 2.96 in 1990, while the comparable figure for the Hispanic Origin population was 4.34. J.S. App. 103.

These depressed socioeconomic characteristics for Latinos in the County not only contribute to but are reflective of the lack of Latino access to the political process. At the time of filing this action on September 6, 1991, there had never been a Latino municipal court judge in the County. J.S. App. 103. Membership on the municipal court is secured by election or, in the case of interim vacancies, by way of a gubernatorial appointment. Article VI, Section 16 (b) & (d), California Constitution. State governors had never appointed a Latino to serve on the municipal court and the only two Latino candidates for the municipal court lost in the 1986 elections. J.S. App. 103. There was a similar absence of Latino representation on the County's Board of Supervisors from 1890 to 1992. J.S. App. 98.

Elections in the County are characterized by Anglo bloc voting which has defeated the electoral choices of the Latino community. J.S. App. 96 - 97. This Anglo bloc voting coupled with a numbered place system for electing municipal court judges has impaired the opportunity of Latinos to elect candidates of their choice. J.S. App. 96, 99.

Latinos also have experienced discrimination that has affected their rights to effectively participate in the political process. An English literacy test, a prerequisite to voting in 1895 and enforced as late as the 1960s, has served to discriminate against Latinos. J.S. App. 97. Moreover, on two separate occasions, the Attorney General, pursuant to Section 5, issued letters of objection disapproving an inadequate bilingual election procedure and a county board of supervisor redistricting plan which divided a politically cohesive Latino community. J.S. App. 97 - 98. Finally, the County has stipulated that it is unable to prove, as required by Section 5, that several of the County's consolidation ordinances at issue herein did not have a retrogressive effect on Latino voting strength. J.S. App. 98 - 99.

Procedural History

On November 1, 1968, the date of Section 5 coverage for the County, there were two municipal court districts and seven justice courts in the County. Jt. App. 129, n. 3. Each of the municipal court districts and the justice court districts comprised separate election districts. By 1983, the consolidation ordinances had produced one countywide municipal court district, effectively altering the method of electing municipal court judges from district elections to a single at-large or countywide election system. Jt. App. 125.

After the three-judge panel of the district court ruled that these ordinances were subject to Section 5 preclearance, Jt. App. 47 - 59, and the County voluntarily dismissed its judicial preclearance action, Jt. App. 125 - 126, the Appellants and the County on November 22, 1993 submitted to the district court their Parties Stipulation and Court Order. The proposed stipulation sought to suspend the application of Article VI, Section 16(b) of the California Constitution, thereby permitting

the Appellants and the County to implement an election plan consisting of seven election areas.[5] Under the proposed election area plan, three of the election areas would each elect two municipal court judges and four of the election areas would elect a single municipal court judge. In addition, some of the election area boundaries divided municipalities. Candidates for these election areas did not have to reside in the election area, but did have to reside within the County. The election areas were to be used only for the purpose of electing judges. Under the proposal, the County continued to have a single countywide judicial district.[6] Intervenor Sillman's App. 3a - 10a.

After the first proposal was filed, the State of California intervened and opposed the election area plan. Jt. App. 60 - 68. The State argued that the separation of the electoral and jurisdictional bases of municipal court judges violated Article VI, Section 16 (b) in that the election areas were smaller than the court's countywide jurisdiction. Jt. App. 66. The State also argued that the plan would undermine the administration of justice, since the authority of the judges was not conferred by a district-wide election as envisioned by the state constitution. Jt. App. 66.

On December 22, 1993, the district court declined to

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[5] There was a question as to whether Article VI, Section 16(b) required elections for municipal court judges to be held district-wide.

[6] The Appellants stipulated that no evidence had been discovered showing that the County had adopted the ordinances pursuant to a discriminatory purpose. The County also stipulated that it could not demonstrate that several of these ordinances did not have a retrogressive effect on Latino voting strength. Intervenor Sillman's App. 4a.

approve the Parties Stipulation and Court Order. The district court concluded that the proposed plan appeared to conflict with Article VI, Section 16(b) by separating the electoral base from the municipal court's jurisdictional base. The district court was not satisfied that an election plan could not be developed that complied with both Section 5 standards and with state constitutional requirements. The parties were given another opportunity to submit a new plan consisting of municipal court districts which were configured "so as to safeguard minority rights." Jt. App. 70.

On January 13, 1994, the Appellants and the County submitted the Parties Second Stipulation and Court Order. The second proposal maintained a single countywide municipal court district that would be divided into four divisions solely for the purposes of the electoral process. By keeping a single countywide district for jurisdictional purposes, the parties sought to avoid any conflict with state constitutional provisions. Intervenor Sillman's App. 13a.

Under the proposed division plan, three of the election areas would each elect one judge and the remaining division would elect seven judges. Some of the boundaries of the divisions divided municipalities. Candidates for these divisions did not have to reside in the election area, but had to reside within the County.[7] Intervenor Sillman's App. 16a.

The State of California objected to this second proposal. Jt. App. 76. The State argued that the division plan did not

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[7] As with the first proposal, the Second Stipulation contained the same language regarding the absence of any discriminatory purpose in the adoption of the consolidation ordinances and the inability of the County to meet the Section 5 retrogression standard. Intervenor Sillman's App. 12a.

maintain a linkage between a judge's electoral and jurisdictional bases. Jt. App. 81. The State also argued that some of the divisions contained less than 40,000 individuals thereby violating the population requirements for a municipal court district specified in Article VI, Section 5 of the California Constitution. Jt. App. 82. The State also opposed the splitting of the City of Salinas in the proposed division plan as contrary to Article VI, Section 5 (a) of the California Constitution, which prohibits the splitting of any municipality into two or more municipal court districts. Jt. App. 83. In addition, the State objected to the absence of any requirement that a judicial candidate reside in the division for which the candidate seeks election, contrary to California Government Code Section 71140, which requires candidates to be residents of the judicial district. Jt. App. 84.

On March 1, 1994, the district court filed an Order declining to approve the Second Stipulation and Court Order. Jt. App. 88 - 92. The district court was again not satisfied that an election plan could not be developed which complied with both state constitutional requirements and Section 5 standards. The district court ordered the County to submit a new plan that met both state and federal law requirements. If such an election plan could not be submitted, the County was to show cause by "affidavits, stipulation of the parties, or other admissible evidence," Jt. App. 91, why it could not do so.

Pursuant to the district court's March 1, 1994, Order, the Appellants and the County filed a series of factual stipulations demonstrating that an election plan, which complied with Section 5 standards, could not be developed while also adhering to Article VI, Sections 16(b) and 5 of the California Constitution. J.S. App. 92 - 108. Additional stipulations relating to demographic information, the presence of politically cohesive Latino communities and Anglo bloc voting, a legacy of discrimination affecting the right to vote, the use of

discriminatory numbered places, and the presence of socioeconomic disparities between the Latino community and the non-Latino community, were also filed. *See* Stipulations Nos. 3, 4, 5, 6, 7, 8, 9, 10; J.S. App. 94 - 99.

In addition, the County stipulated that the Board of Supervisors was unable to prepare a plan that did not conflict with at least one state law and still comply with Section 5 standards. Stipulation No. 15; J.S. App. 107. As support, the County presented 10 maps which consisted of alternative election plans. All of these plans demonstrated that the interests advanced by both state and federal laws could not be accommodated in a single plan. Stipulation Nos. 14 a, through 14 k; J.S. App. 104 - 107.

The State of California filed a response to these stipulations. While the State noted, "Nothing herein should be construed, however, to reflect agreement by the State's concurrence in the County's stipulation," the State did not object to specific stipulations. Jt. App. 94.

On May 3, 1994, the district court filed a Tentative Order. Jt. App. 96. This Tentative Order required the County to conduct a municipal court election pursuant to an interim plan pending legislative action on a permanent plan. The interim plan consisted of a countywide election. Under this plan, those municipal court judges elected would have their terms shortened. The district court noted: "The court is cognizant of the fact that the interim plan fails to fully address plaintiffs and Monterey County's concerns or remedy the apparent retrogressive effect several of the consolidation ordinances have on Latino voting strength in Monterey County." Jt. App. 99. Despite these reservations, the district court concluded that a countywide method of election provided a "mechanism to ensure the citizens' right to elect judges while an appropriate legislative

solution to the problem is devised." Jt. App. 99. The adverse effects of this interim plan, in the district court's view, were diminished because of the shortening of judicial terms for those municipal court judges elected. The district court noted that the exigency of an imminent election and the absence of any viable options justified the use of an election plan which "may be legally infirm." Jt. App. 100. The district court also stated that the various proposals presented by the Appellants and the County "would alter the [judicial election] structure embodied in the California Constitution and statutes, would do too much violence to legislative and state interests, and would create more problems than it solves." Jt. App. 100 - 101. The district court invited responses from the parties to the Tentative Order.

After receiving responses from the parties and the United States as *amicus curiae*, the district court on June 2, 1994, vacated its previous Tentative Order and enjoined the County from conducting elections for municipal court judges until either a plan secures Section 5 preclearance or until further order from the district court. Jt. App. 103 - 110. The district court held: "The court is now convinced that permitting the voters to cast ballots under a[n at-large election] plan that has not been precleared and that has an apparent retrogressive effect on Latino voting strength would not be in the best interests of the voters." Jt. App. 106. The district court also repeated its reservations regarding the use of any of the proposals advanced by the Appellants and the County. In addition, the district court observed that a return to the election system in place on November 1, 1968, the date that the County became subject to Section 5, was "not a workable interim solution." Jt. App. 107.

The district court invited the parties, as well as the State of California and the United States, to develop an election plan

which complied with Section 5 standards.[8] If a legislative solution was not forthcoming, the district court stated that it might implement a court-ordered plan.[9] The district court scheduled a status conference for November 3, 1994, to determine what steps had been taken to develop a permanent plan. Jt. App. 109.

At the status conference, the County related its good faith efforts to secure changes in the California Constitution which would permit the County to adopt a plan which did not violate federal law. These efforts were unsuccessful. Jt. App. 128. The State Legislature did not even place before the voters any proposed constitutional amendments which addressed the County's obligation to develop a plan which complied with both state and federal laws.

On December 20, 1994, to avoid any further delay in elections for municipal court judges, the district court ordered a special judicial election scheduled for June 6, 1995. The

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[8] The district court emphasized the importance of the State's participation in any proceedings to develop a new election plan: "The court finds that it would be beneficial for the State and the United States to assist the County in the development and expedited preclearance of a plan that will comply with the Voting Rights Act and with federal and California state law (or at least minimally intrude on state policy)." Jt. App. 108 - 109 (footnote omitted).

[9] The district court also denied Appellants' motion to vacate recent judicial appointments made by Governor Pete Wilson or to shorten the terms of those judicial appointees. The district court, however, stated that any judicial appointees would "have to face election under the new redistricting plan." Jt. App. 109.

district court further ordered the County to implement, on a temporary basis, the division plan submitted as part of the Appellants' and the County's Second Stipulation and Court Order. Jt. App. 123, 137.

In ordering a division plan, the district court carefully considered several alternatives. Preliminarily, the district court noted that continuing the injunction without any election pending Section 5 approval of a permanent plan would deprive voters of their right to elect judges. Jt. App. 129. Moreover, "temporary relief [was] ... necessary to enable elections to go forward at [that] ... time without violating the Voting Rights Act." Jt. App. 131, n. 5. The district court also concluded that a return to the election plan in place on November 1, 1968, was "impractical." Jt. App. 128 - 129. Further, the district court was reluctant to implement an at-large election as an interim plan "in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength." Jt. App. 130, n. 4.

Ultimately, the district court narrowed its options to two choices -- the multiple municipal court district approach and the division approach. Implementation of the multiple district approach would pose significant administrative problems.[10] The division approach would avoid these administrative problems but would involve a departure from the constitutional provision requiring linkage between a judge's electoral and jurisdictional bases, Article VI, Section 16 (b). Both options would require a

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[10] The district court noted that such an approach would require "substantial administrative changes," such as the reassignment of personnel, and establishing new administrative procedures, and "would significantly interfere with the County's ability to provide uninterrupted efficient and effective delivery of municipal court services." Jt. App. 133.

departure from the state constitutional provision, Article VI, Section 5, regarding the splitting of municipalities. Jt. App. 130 - 133.

In deciding in favor of the division approach, the district court found that the "division plan allows the County to continue administratively operating the municipal courts in the county as it currently does." Jt. App. 133. The district court then examined the asserted interests advanced by the state constitutional provisions. With respect to the prohibition of splitting city boundaries, the district court concluded that such a policy did not appear compelling, since the state constitution permitted any city in San Diego County to be divided into more than one municipal court district " 'if the Legislature determines that unusual geographic conditions warrant such division.' " *Id.*, *quoting* Cal. Const. Art. VI, § 5 (d).

With respect to the asserted state interest in maintaining linkage between jurisdictional and electoral bases, the district court, noting that "the intrusion on state law does not seem as substantial as it initially appears," underscored the common practice of the Chief Justice of the California Supreme Court of assigning municipal court judges from one district to serve on another municipal court district or in another county. Jt. App. 134 - 135. Based upon these judicial assignments, the district court concluded: "Therefore, as a practical matter, linkage between a judge's electoral and jurisdictional bases cannot be considered an overwhelmingly strong public policy . . . [T]here is no strict linkage presently existing in California courts." Jt. App. 135.[11] In summary, the absence of any compelling state

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[11] The district court's conclusions were also supported by the fact that the jurisdiction of a municipal court judge is statewide, Cal. Civ. Proc. Code § 84, and that pursuant to Article VI, Section 15 of the California Constitution, the Chief

policies supported the district court's decision to implement the division plan on an interim basis.[12] The district court also enjoined any future municipal court elections pending the adoption of a Section 5 precleared plan or until further order. Jt. App. 137.

In the December 20, 1994, Order, the district court also suggested that the County seek Section 5 preclearance of its proposed division plan. Jt. App. 136 - 137. Accordingly, the County submitted the division plan to the Attorney General for Section 5 preclearance. On March 6, 1995, the Attorney General precleared the division plan. J.S. App. 53 - 55.

After the filing of the December 20, 1994, Order, the Honorable Stephen A. Sillman, Presiding Judge of the Monterey County Municipal Court, moved to intervene to secure a modification to the terms of office for the newly elected judges. The Presiding Judge sought to extend the terms to six years retroactive to 1994. Jt. App. 152.

Subsequently, the district court on April 13, 1995, filed an Order granting the Presiding Judge his application for intervention in an official capacity. Jt. App. 160 - 163. The district court also denied his motion to modify the terms of the newly elected judges. Since the implementation of the division plan was to be a temporary solution, the district court was reluctant to extend any judicial terms. The district court

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Justice of the California Supreme Court can assign a municipal court judge to serve on any court in the state. Jt. App. 134.

[12] In ordering a special election, the district court permitted the County to avoid the application of Sections 5 and 16(b) of Article VI of the California Constitution in adopting the temporary division plan. Jt. App. 133 - 135.

expected the parties to agree on a permanent plan in time for the March 26, 1996, primary election. A status conference was scheduled for September 28, 1995. Jt. App. 161 - 162. As the result of this Court's decision in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), the district court requested additional briefing on the impact of *Miller*. Jt. App. 163, 164.

At the September 28, 1995, status conference, the parties informed the district court of their respective positions as to the issuance of another interim remedy since the County and the State had not developed a permanent plan. The Presiding Judge requested that elections proceed on an at-large election basis with those judges elected serving full six-year terms. Jt. App. 166. The State suggested that an appropriate remedy would be either a countywide election or a return to the election plan in effect on November 1, 1968. Record, Reporter's Transcript of Proceedings, September 28, 1995, Docket Entry No. 161, at 8 [hereinafter cited as September 28, 1995, Transcript]. In addition, the State requested that this Section 5 action be dismissed as moot, because the County was conducting municipal court elections pursuant to state statutes precleared under Section 5. If the action was not dismissed, the State requested to be joined as a necessary party and to be permitted to relitigate the merits of the Section 5 preclearance issues. Jt. App. 166. The County requested that the terms of the newly elected judges be extended to permit the development of a permanent plan. September 28, 1995, Transcript at 17.

The Appellants requested that the district court conduct an evidentiary hearing prior to issuing any court-ordered remedy. September 28, 1995, Transcript at 30. The Appellants also requested that judicial terms be extended until a permanent election plan could be implemented. Alternatively, the Appellants supported the position of the County. September 28, 1995, Transcript at 31.

The district court never conducted the evidentiary hearing, as requested by Appellants, prior to ordering implementation of an unprecleared at-large plan. Instead, on November 1, 1995, the district court filed an Order modifying the injunction granted on December 20, 1994. Jt. App. 165. The district court recognized that there was a continuing Section 5 violation. Jt. App. 166. The district court also found that no permanent plan could be implemented in time for the March 26, 1996, elections. Moreover, a return to the election plan existing on November 1, 1968, was "not legal, feasible or desired." Jt. App. 167. Finally, the district court declined to extend the terms of the newly elected judges which were due to expire in January 1997. Jt. App. 173.

The basis for the district court's ruling was its expressed concerns regarding the constitutionality of the temporary division plan. Citing this Court's decision in *Miller*, the district court concluded that there is substantial doubt that race-based districts "can ever withstand constitutional scrutiny."[13] Jt. App. 161. Notwithstanding the absence of preclearance for countywide elections, the district court ordered the County to conduct municipal court elections on a countywide basis in the upcoming March 26, 1996, elections with any run-off elections to be held on November 5, 1996. Jt. App. 180.

In ordering countywide elections, the district court did

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[13] The district court assumed that the temporary division plan implemented in the special June 6, 1995, municipal court elections was in fact race-based. Jt. App. 167. The basis for the district court's conclusion appears to be the statement made by the County's counsel at the September 28, 1995, Status Conference who stated that race was the "sole motivation" for the configuration of the various divisions. September 28, 1995, Transcript at 16.

recognize that the implementation of at-large elections in the County raised "some legitimate concerns." Jt. App. 167. The district court referred to the stipulation submitted by the Appellants and the County stating that the Board of Supervisors was unable to demonstrate that several of the judicial district consolidation ordinances did not result in a retrogression of Latino voting strength. Although the district court had not accepted the stipulation, it could not "overlook that stipulation in fashioning a temporary solution." Jt. App. 167.

The district court listed three reasons supporting the use of an at-large election system as an interim plan. First, the district court observed that the instant action was not a proceeding under Section 2 of the Voting Rights Act.[14] Jt. App. 167, 172. Second, the Appellants and the County did not suggest any evidence that the consolidation ordinances were adopted pursuant to a discriminatory purpose. Third, the district court believed that *Miller* raised serious doubts that an alternative race-based districting plan could ever withstand constitutional review.[15] Jt. App. 167. A countywide election system, the court reasoned, avoided these problems. Jt. App.

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[14] Under Section 2, minority voters can challenge an election practice or structure if such a practice or structure denies the minority community an equal opportunity to participate in the political process and elect a candidate of its choice. 42 U.S.C.§ 1973.

[15] The district court noted that race-based election districts raised constitutional concerns especially in the context of municipal court judges who served the entire County. Moreover, there was no claim that the boundaries of Monterey County were configured so as to deprive any racial or ethnic group of their voting power. Jt. App. 171 - 172.

171.[16]

In its Order, the district court rejected the contention advanced by the Appellants and the County that implementing countywide elections would be retrogressive when compared to the interim division plan. Jt. App. 171 - 172. The Appellants and the County argued that based upon the regulations governing the administration of Section 5, the appropriate retrogression comparison was to the "last legally enforceable" election plan. 28 C.F.R. § 51.54(b). Jt. App. 171 - 172. However, the district court rejected this interpretation by holding that the division election plan was not the last legally enforceable election plan, since the district court had to suspend applicable state constitutional provisions to permit its implementation and the division plan was used only on an emergency basis. Also, without the benefit of any evidence, the district court held that the at-large election was not retrogressive when compared to the plan in effect prior to the consolidation ordinances, Jt. App. 172, despite the County's stipulation that its ordinances were retrogressive. J.S. App. 98 - 99.

In the November 1, 1995, Order, the district court deferred any hearings in order to permit the County to develop a permanent plan. Jt. App. 173. The district court also joined the State as a party defendant and permitted the State to assert defenses, including defenses based on the alleged inapplicability of Section 5. Finally, the parties were ordered to provide by September 6, 1996, reports to the district court regarding any progress in the adoption of a permanent plan. *Id.*

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[16] As further support, the district court noted that the at-large election system was the legislative choice of the citizens of the County and was "more protective of minority voting rights as defined in *Miller*." Jt. App. 172.

After the filing of the November 1, 1995, Order, the Attorney General on November 13, 1995, issued a letter stating that the countywide method of electing judges had not received the required Section 5 approval. J.S. App. 28 - 33.

The district court on November 30, 1995, denied Appellants' motion for reconsideration. In its denial of the motion for reconsideration, the district court stated that the basis for ordering countywide elections was the district court's equitable powers to fashion a temporary plan pending Section 5 approval of a plan which does not violate state law. The district court's Order "was not based on any assumption that countywide elections for municipal court judges had been precleared." Jt. App. 184.

On November 30, 1995, the Appellants filed their Notice of Appeal. J.S. App. 26 - 27. On January 2, 1996, the district court denied Appellants' motion for a stay pending appeal. Jt. App. 185. On February 1, 1996, this Court granted Appellants' application for a stay of the district court's November 1, 1995, Order. On April 1, 1996, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

Section 5 covered jurisdictions may not implement voting changes unless preclearance has been obtained. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In April 1993, the district court found that Monterey County had failed to obtain the requisite Section 5 approval to implement its at-large election plan. Two years later, the district court ordered implementation of this same unprecleared plan thereby violating this Court's longstanding Section 5 precedent.

In doing so, the district court acted precipitously and in violation of this Court's admonition in *Clark v. Roemer* that

unprecleared voting changes may be implemented only under "extreme circumstances." 500 U.S. at 654. There were no "extreme circumstances" present on November 1, 1995, that might justify the lower court's ordering implementation of an unprecleared at-large system.

The Section 5 precleared interim division plan, then in effect, was constitutionally sound and fully consistent with the standards articulated in *Miller*. Yet even if the district court doubted the continued viability of the interim plan post-*Miller*, more than one year remained prior to the expiration of any judicial terms in January 1997. The district court thus had ample opportunity to conduct an evidentiary hearing, adequately assess the constitutionality of the interim plan, consider alternatives if the interim plan was deemed to be unconstitutional in light of *Miller*, and still provide for judicial elections at the regularly scheduled November 1996 general election with any run-off elections in December.

As a last resort, if the district court considered this time period too short, it should have extended the judicial terms. *Brooks v. State Bd. of Elections*, 790 F.Supp. 1156 (S.D. Ga. 1990). But the one option that it could not lawfully order -- implementation of an unprecleared plan -- is the option that it chose. Its order must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING ELECTIONS TO BE CONDUCTED PURSUANT TO VOTING CHANGES SUBJECT TO, BUT NOT PRECLEARED UNDER, SECTION 5

The district court, by ordering elections to proceed pursuant to voting changes that the court already found to be

unprecleared, disregarded this Court's longstanding precedent prohibiting implementation of unprecleared election changes. As initially held in *South Carolina v. Katzenbach* and repeatedly reaffirmed over the past thirty years,[17] voting changes subject to the Section 5 preclearance provisions are automatically suspended.

As an unanimous Court held in *Clark*:

> "Here the District Court did not face the *ex post* question whether to set aside illegal elections; rather it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, Sec. 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election."

Id., 500 U.S. at 654. The district court's order violates these clear commands of Section 5. Accordingly, this Court should reverse and direct the district court, on remand, to enter an injunction[18] restraining any further use of the unprecleared changes unless and until preclearance is obtained from the Attorney General or the District Court for the District of Columbia.

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[17] *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969); *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *Connor v. Waller*, 421 U.S. 656 (1973); *U.S. v. Board of Supervisors*, 429 U.S. 642, 645 (1977).

[18] In *Allen, supra*, 393 U.S. at 555, this Court recognized the right of private parties to secure an injunction to prevent the implementation of voting changes which have not been submitted for Section 5 approval.

There can be no dispute that the countywide method of electing municipal court judges has not received Section 5 preclearance. On April 1, 1993, the district court held that "the Monterey County Ordinances at issue herein, . . . constitute election changes subject to Section 5 preclearance and that, further, the ordinances have not been precleared . . ." Jt. App. 59. Thus, by its own admission, the district court ordered the implementation of a change affecting voting which has not received the requisite approval under Section 5.

Additionally, on November 13, 1995, the Attorney General affirmed that the countywide election system for municipal court judges in the County has never been approved pursuant to Section 5.[19] As noted by the Attorney General:

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[19] While appellants disagree with the United States' revised factual contention that preclearance was granted for one of the relevant County ordinances (No. 2930), we fully agree that this ambiguity is immaterial to this Court's ultimate review of the district court's November 1, 1995, Order. Amicus Brief of United States at 15 - 16, n.10. The State's submission of the 1983 statute did not identify the other relevant County ordinances that consolidated the judicial districts nor did the submission reveal that the three districts consolidated by Ordinance No. 2930 were themselves dependent upon antecedent, unprecleared consolidations. "When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to Sec. 5 . . . cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to Sec. 5 preclearance." *McCain v. Lybrand*, 465 U.S. 236, 256 (1984). Therefore, even if the changes effected by

> "Contrary to representations that apparently were made at ... [the September 28, 1995] status conference, the at-large method of election for the municipal court judges in Monterey County was never submitted for Section 5 review, and it has not been precleared.
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> ...
>
> ... Thus, it is clear from the submission letter that the at-large method of election was never submitted for Section 5 review, and the March 6, 1995, preclearance letter [approving the interim plan for the June 6, 1995, special election] demonstrates that the Attorney General did not review or preclear the at-large method of election."

J.S. App. 29 & 31.

Implementation of the district court's Order will infringe upon the rights of Latino voters to participate in an election system which complies with federal law. Most significantly, the Order will result in the replacement of municipal court judges who were elected pursuant to a temporary division election plan which received Section 5 approval with municipal court judges who will be elected pursuant to an election system which violates federal law.[20]

Ordinance No. 2930 were precleared, "they may not be implemented unless and until all of the underlying changes are precleared." Amicus Brief of United States at 16, n.10.

[20] *See Campos v. City of Houston*, 968 F.2d 446, 452 (5th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993) (court abused its discretion in implementing Section 5 unprecleared

Given the absence of any Section 5 preclearance herein, the district court's November 1, 1995, Order implementing an unprecleared method of electing municipal court judges presents a clear violation of the Voting Rights Act and should be reversed.

II. NO "EXTREME CIRCUMSTANCES" EXIST THAT COULD JUSTIFY THE USE OF UNPRECLEARED ELECTION CHANGES

In *Clark*, a case substantially similar to the action *sub judice*, this Court reversed a district court's refusal to enjoin unprecleared elections. The district court had cited a number of reasons for not enjoining the election, none of which this Court found persuasive. The lower court pointed to: (1) the short time between the most recent request for an injunction and the election; (2) the fact that qualifying and absentee voting had begun; and (3) the time and expense of the candidates. *Clark*, *supra*, 500 U.S. at 653 - 54. This Court rejected these factors as justifying the refusal to enjoin an unprecleared election. Instead, referring to a procedural history mirroring the instant action, this Court found that the parties, the district court, and the candidates had been on notice of the alleged Section 5 violations since appellants filed their amended complaint three years earlier. *Id.*, 500 U.S. at 655.

In *Clark*, this Court did set forth an "extreme circumstance" in which a district court's refusal to enjoin an unprecleared election might be justified: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.*, 500 U.S. at 654-655. Here, all

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election plan when Section 5 precleared plan was available).

parties and the district court were on notice of Section 5 violations for a period of four years prior to the court ordering the unprecleared election. No "extreme circumstance" existed that could justify departure from thirty years of Section 5 precedent in this Court.

The district court actually did not face any constraints that could be characterized as "extreme." This Court's decision in *Miller* was issued in late June 1995. The next regularly scheduled election in California was set for March 26, 1996, almost nine months later. This period should have been sufficient for the court to conduct an evidentiary hearing at which its concerns regarding *Miller* could have been addressed and resolved. But even if this time period were not sufficient, the district court could have scheduled the judicial elections to coincide with the State's November 1996 general election with any run-off elections in December. Under either scenario, elections would be held prior to the expiration of judicial terms in January 1997.

A. None of the Factors Cited by the District Court Justifies the Use of Unprecleared Election Changes

The district court listed several reasons to support its order to implement an election system which had not secured Section 5 preclearance. First, the district court noted that there was no Section 2 claim in this action. Jt. App. 167. The absence of a Section 2 claim was cited by the district court in two instances. The first instance related to the "legitimate concerns" advanced by the Appellants in arguing against the implementation of countywide elections. The district court appears to suggest that the absence of a Section 2 finding of liability against the use of an at-large election system provides significant support for its ordering the implementation of

countywide elections as part of an interim election plan.

The district court's reliance on the absence of a Section 2 claim is misplaced. Under this Court's precedent, Appellants could not initiate any Section 2 action against the at-large election system until Section 5 approval had been obtained. According to *Connor v. Waller*, *supra*, 421 U.S. at 656, the at-large election system, absent Section 5 preclearance, is unlawful and not in effect. In *Connor v. Waller*, the district court was prohibited from ruling on the constitutional validity of reapportionment statutes until Section 5 preclearance had been obtained. *Id.* In view of this precedent, Appellants could not initiate a Section 2 challenge to an election system which was not in effect.[21] Thus, the absence of a Section 2 claim in this action could not justify a departure from this Court's consistent line of precedent in order to implement an election change which has not received Section 5 preclearance.

The second reason advanced by the district court to support the use of a countywide election system related to the absence of any evidence that the consolidation ordinances were adopted pursuant to a discriminatory purpose. Jt. App. 167. Such a focus is in error. The legal issue of whether the consolidation ordinances were adopted pursuant to a discriminatory purpose can only be resolved by the Attorney General or the District Court for the District of Columbia along with the question of whether the Section 5 covered jurisdiction

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[21] The second instance of the district court's reliance on the absence of a Section 2 claim relates to its decision to "defer holding any hearing on a permanent plan." Jt. App. 172. Since a Section 2 claim could not be filed by the Appellants, its absence should not have a bearing on whether the district court will conduct an evidentiary hearing on a future permanent election plan.

can demonstrate the absence of a discriminatory effect on minority voting strength. 42 U.S.C. § 1973c. In the instant action, the applicable ordinances have not secured the requisite Section 5 preclearance. Absent such preclearance, the at-large election system cannot be implemented. Thus, the absence of any evidence of discriminatory purpose in the adoption of the consolidation ordinances, where the Section 5 covered jurisdiction has failed to secure preclearance of the ordinances, cannot justify the use of an at-large election change ultimately resulting from the implementation of these unprecleared ordinances.

B. *Miller* Does Not Require the Use of Unprecleared Election Changes

The district court also relied upon *Miller* as support for the implementation of countywide municipal court elections. As interpreted by the district court, *Miller* casts doubt on the constitutionality of race-based redistricting plans and accordingly, the at-large election system presents the best election structure to protect minority voting rights in the County. Jt. App. 167 - 172. However, a review of *Miller* demonstrates that the district court misapplied this Court's holding and its error cannot serve as a basis for the implementation of an election change which has not secured Section 5 preclearance.

Miller involved a constitutional challenge to the congressional redistricting plan for the State of Georgia. This Court held that a race-based redistricting plan, where race was the predominant motivating factor *and the jurisdiction subordinated traditional redistricting principles*, is unconstitutional unless the "districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, *supra*, 115 S.Ct. at 2490. To invoke strict scrutiny, it is not sufficient

merely to show that racial factors were relied upon. Instead, a party must demonstrate that a jurisdiction relied on race "in substantial disregard of customary and traditional districting practices." *Miller*, *supra*, 115 S.Ct. at 2497 (J. O'Connor, concurring).

But even application of strict scrutiny is not fatal to a jurisdiction's districting plan. While noting that strict scrutiny is "our most rigorous and exacting standard of constitutional review," *Miller* made clear that a court's inquiry does not terminate upon invocation of the standard. *Id.*, at 2490. Underscoring that strict scrutiny simply shifts the burden of producing evidence, this Court held that a jurisdiction could satisfy its burden by demonstrating a compelling interest. *Id.* Here, for example, a compelling interest might be avoiding retrogression by favoring a precleared districting plan over an unprecleared, admittedly retrogressive, at-large plan at least until a permanent plan can be developed.

Despite *Miller's* carefully conceived scheme for conducting a 14th Amendment inquiry, the lower court inexplicably denied the parties any opportunity to present evidence that might bear on this constitutional determination.[22] Instead, the district court appears to have relied on a single, unsworn statement to conclusively decide that the June 1995 interim division plan was unconstitutional.

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[22] For example, at an evidentiary hearing, the Appellants would have presented evidence that the June 1995 interim division plan incorporated traditional redistricting principles such as geographical compactness. When the interim division plan is compared to the 1968 judicial district plan, the divisions are equally as compact as the judicial districts. Intervenor Sillman's App. 49a, 51a.

The County Counsel's statement at a status conference that the June 1995 plan was race-based cannot substitute for the required evidentiary hearing. The attorney's statement was not subject to cross-examination nor was there any opportunity to offer rebuttal evidence. Yet even if the district court properly relied on the County Counsel's statement that the June 1995 election plan was race-based, the plaintiffs should have been given an opportunity to demonstrate that the plan satisfied the strict scrutiny standard. Indeed, in a case decided the same day as *Miller*, this Court approved of a redistricting plan in which race was a significant factor. *Dewitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in relevant part and dismissed in part*, 115 S.Ct. 2637 (1995).

The California redistricting plan examined in *Dewitt* was drawn by a panel of Special Masters appointed by the California Supreme Court. The Court specifically approved of the Special Masters' approach in "determining the compactness of a particular minority group for purposes of assuring its protection under the Voting Rights Act." *Id.*, 856 F.Supp. at 1411, *citing Wilson v. Eu*, 4 Cal. Rptr. 2d 379, 383-384 (1992). This approach included an attempt by the Special Masters to "accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district."[23]

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[23] Relevant to maintaining "geographically compact" minority groups, the California Supreme Court also approved of the Special Masters' approach in splitting municipalities. In the analogous context of congressional redistricting, Cal. Const. Art. XXI, the California Supreme Court addressed the possible conflict between the Voting Rights Act and the state constitution "where a geographically compact minority group is located partly within and partly without a city ... In areas where such a situation exists, and where a minority influence district could be

Id. For example, in Los Angeles, the Masters "started both by tracing a line around census tracts with majority or near majority Latino population and by mapping out what areas were covered by Latino districts created by the various plans submitted to us." *Wilson, supra*, 4 Cal. Rptr. 2d at 418.

The *Dewitt* court found that the Masters "properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered." *Dewitt, supra*, 856 F.Supp. at 1413. The court held that since the plan did not amount to racial gerrymandering, strict scrutiny was not triggered. *Id.* 856 F.Supp. at 1415. Even if strict scrutiny were applied, the district court held, the plan had "been narrowly tailored to meet a compelling state interest." *Id.*

This Court summarily affirmed with respect to questions 1 through 4 of the Jurisdictional Statement, which can be summarized as follows: (1) whether the California plan, created by Special Masters who stated that one of their primary objectives was to create special racial districts, constituted a racial gerrymander; (2) whether race-based redistricting, absent compelling justification, violates the 14th and 15th Amendments; (3) whether "packing" white voters in high turnout districts impermissibly dilutes their voting strength; and (4) whether plans that deviate in "actual voting strength" violate the principle of "one-person, one-vote." *Dewitt*, 115 S.Ct. 2637 (Jurisdictional Statement).

Therefore, *Dewitt*, like *Miller*, stands for the proposition that race-conscious redistricting will not even trigger strict scrutiny when traditional redistricting principles are applied.

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created, we have given precedence to keeping geographically compact minority groups together rather than maintain city boundaries." *Wilson, supra*, 4 Cal.Rptr.2d at 409.

But, in summarily dismissing the June 1995 plan as unconstitutional, the district court here never conducted the requested evidentiary hearing, never afforded plaintiffs an opportunity to demonstrate a compelling interest for the June 1995 plan, and instead ordered implementation of an unprecleared, at-large plan that it knew might be retrogressive. In its December 20, 1994, Order, the district court stated that it was "reluctant to consider a single district, countywide election plan as a temporary remedy in light of the supported stipulation [between the County and the Appellants] that such a plan would be retrogressive in terms of Latino voting strength."[24] Jt. App. 129 - 130, n. 4. The County's stipulation, and the district court's reliance on it, together with the fact that the at-large system had never been submitted for Section 5 review, should have caused the district court to consider alternative remedies[25] before ordering implementation of an unprecleared plan.

Finally, the district court misapplied this Court's holdings in concluding that an at-large election system was superior in protecting the rights of minority voters as defined in *Miller*. As noted above, the district court did not complete the

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[24] In its November 1, 1995, Order, the lower court backed away from this determination in finding that, based upon "the reasoning of *Miller*, the court cannot say that a countywide election plan is necessarily unlawfully retrogressive." Jt. App. 172. The district court's ambivalence strongly suggests that the issue of retrogression in a court-ordered at-large system is, at the very least, a close question that should not have been decided adversely to plaintiffs without the benefit of an evidentiary hearing.

[25] For example, the district court could have developed an alternative districting plan which, in the district court's view, did not trigger strict scrutiny.

constitutional analysis required by *Miller* to determine if, in fact, the division election plan was unconstitutional. Nevertheless, the district court approved the use of an at-large election system by suggesting that such an election plan was not unconstitutional and was more protective of minority voting rights than the previous division election plan.

But the district court could not engage in any constitutional analysis or otherwise review a method of election which has not received the requisite Section 5 preclearance. *U.S. v. Board of Supervisors*, *supra*, 429 U.S. at 646 - 647 ("In both instances the court below erred in deciding the questions of constitutional law; it should have determined only whether Warren County could be enjoined from holding elections under a new redistricting plan because such plan had not been cleared under § 5." (footnote omitted)). *See also Connor v. Waller*, *supra*, 421 U.S. at 656 (election plans "are not now and will not be effective as laws until and unless cleared pursuant to § 5.").

Moreover, the preference for an at-large election system is inconsistent with the concern expressed by this Court in *Allen* that such election systems have the potential to discriminate against minority voting strength:

> "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

Allen, *supra*, 393 U.S. at 569. In this case, such a concern is not completely unwarranted in view of the uncontested stipulations submitted by the Appellants and the County suggesting that an at-large election system has the potential for

violating Section 2 of the Act. Brief for Appellants at 43.

Thus, given the potential discriminatory effect of an at-large election system and the absence of any constitutional finding in support of the at-large election system or a constitutional finding that the division election plan was unconstitutional, there was an insufficient basis for the district court to conclude that the at-large election system was superior to the division election plan. Nor can this Court's holding in *Miller* be interpreted to provide any support for the notion that at-large systems are more protective of minority voting interests than districting plans.

C. Given the Absence of "Extreme Circumstances," the District Court Should Have Extended the Terms of Judges Elected in June 1995 Until the County and State Presented a Plan Which Received Section 5 Preclearance

If the district court, for whatever reason, felt that it could not assess the constitutionality of an election plan for either the March or November 1996 elections, then it should have extended the terms of those judges elected in June 1995. The terms could be extended until the County and the State presented a permanent plan which received Section 5 approval.

When faced with the prospect of elections being conducted pursuant to unprecleared plans, other courts have abided by this Court's admonition in *Clark*: "In fashioning its decree granting relief, the District Court should adopt a remedy that in all the circumstances of the case implements the mandate of Sec. 5 in the most equitable and practicable manner and with least offense to its provisions." *Clark*, 500 U.S. at 660. In *Brooks*, for example, the district court initially noted that

preclearance litigation in the District of Columbia could be prolonged and extending judicial terms "may delay the expeditious resolution of this controversy." *Brooks*, *supra*, 790 F.Supp. at 1159. Nonetheless, mindful that "granting the requested relief will continue to 'assure that the defendants will be able to seek judicial review of the statutes without the risk of serious disruption of Georgia's judiciary,' " *Id.* (*quoting Brooks v. State Bd. of Elections*, 775 F.Supp. 1490, 1491 (S.D.Ga. 1989), *aff'd mem.*, 498 U.S. 916 (1991)), the district court extended the judicial terms "until the declaratory action in the District of Columbia is concluded, or until the Georgia legislature enacts a scheme for judicial elections which is precleared, and an election is conducted pursuant to that scheme." *Id.* at 1160.

The judges elected in June 1995 are serving abbreviated terms instead of the usual six-year terms. Jt. App. 137; Cal. Gov. Code § 71145. Thus, extension of these shortened terms not only would allow the district court additional time to consider legally sustainable options but clearly would avoid any disruption of the County's judiciary.[26]

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[26] Providing an extension of judicial terms at this time would not have been any more intrusive than the previous extension of judicial terms for those judges who were elected pursuant to the unprecleared consolidation ordinances pending the adoption and Section 5 preclearance of a permanent election plan. Jt. App. 92 (district court enjoined the County from conducting any elections for municipal court judges until Section 5 preclearance was secured; injunction resulted in the extension of judicial terms until the special June 6, 1995, judicial election).

III. THE DISTRICT COURT ERRED BY FAILING TO FOLLOW THE STANDARDS ESTABLISHED FOR COURT-ORDERED PLANS

Since the County and the State failed to present an election plan which secured Section 5 preclearance, the district court was compelled to issue a court-ordered remedy. As noted by this Court in *Wise v. Lipscomb*, 437 U.S. 535 (1978):

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the ' "unwelcome obligation," ' *Connor v. Finch*, *supra*, 431 U.S. at 415, 97 S.Ct. at 1833, of the federal court to devise and impose a reapportionment plan pending later legislative action."

Wise, *supra*, 437 U.S. at 540.

In fashioning court-ordered plans, this Court has stated in numerous decisions that "the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner ' "free from any taint of arbitrariness or discrimination." ' ". *Connor v. Finch*, 431 U.S. 407, 415 (1977). Accordingly, this Court has required district courts to adhere to certain requirements in fashioning court-ordered plans. The district court did not follow those requirements.

A. The District Court Failed to Incorporate Section 5 Standards

First, the district court's remedy failed to incorporate Section 5 standards. As noted in the 1975 Senate Report accompanying the extension of the 1965 Voting Rights Act: "Furthermore, in fashioning the [court-ordered] plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report No. 94-295, 94th Cong., 1st Sess., at 19 (July 22, 1975).

A review of the legislative history accompanying the 1975 amendments to the Voting Rights Act reveals that there was a concern with federal district courts circumventing Section 5 by incorporating voting changes which had not received Section 5 approval into court-ordered remedies.

> "In other cases, the Section 5 submission requirement has been circumvented by lawsuits filed in Mississippi District Courts. For example, the three-judge District Court in the state legislative reapportionment case ruled recently that the 1973 legislative redistricting did not have to be submitted because that court had continuing jurisdiction to pass on any new plans enacted by the Legislature. Rulings like this create the real danger that discriminatory redistricting can be accomplished by sweetheart suits in which the interests of Black voters are not represented, and such plans can be put into effect without Section 5 scrutiny by the Attorney General."

"Extension of the Voting Rights Act of 1965," Hearings Before

the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess., at 146 (1975) (Testimony of Frank R. Parker, Esq., then Assistant Chief Counsel, Mississippi Office, Lawyers' Committee for Civil Rights Under Law). This testimony formed the basis for the Senate Report's directive that federal district courts in Section 5 covered jurisdictions should incorporate Section 5 substantive standards in their court-ordered remedies.

This Court in *McDaniel v. Sanchez*, 452 U.S. 130, 148 (1981), cited with approval the Senate Report language and stated that the Committee Report was "crystal clear on this point" by noting that "[t]he Committee unambiguously stated that the statutory protections are to be available even when the redistricting is ordered by a federal court to remedy a constitutional violation that has been established in pending federal litigation." *See*, *Upham v. Seamon*, 456 U.S. 37 (1982). *See also*, *Edge v. Sumter County School District*, 775 F. 2d 1509 (11th Cir. 1985).

As a preliminary matter, based upon *McDaniel*, the district court should not have implemented an unprecleared voting change as part of a court-ordered remedy. The district court simply could not bypass this prohibition by stating that the implementation of such a voting change was pursuant to its equitable powers to develop an appropriate temporary remedy pending the Section 5 approval of a permanent plan. Jt. App. 184. Under this standard, covered jurisdictions could avoid the requirements of Section 5 by simply not seeking preclearance, knowing that any subsequent litigation could result in a court-ordered remedy incorporating the unprecleared voting change. Such a standard would clearly invite circumvention of the

Section 5 preclearance requirements.[27]

Moreover, at a minimum, to assure compliance with Section 5 substantive standards, a court-ordered plan must avoid retrogression.[28] In accordance with *McDaniel*, a district court cannot determine whether an election change reflecting the policy choices of a covered jurisdiction is retrogressive. Such a review is reserved exclusively for either the Attorney General or the District Court for the District of Columbia. 42 U.S.C. § 1973c. However, in formulating a court-ordered plan, the district court must ascertain that *its* plan does not result in a retrogression of minority voting strength.

In the present case, the previous temporary election plan

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[27] A similar concern was expressed by the United States in its *Amicus Curiae* Brief in *McDaniel*. The United States argued that an exemption from Section 5 approval of those election plans submitted by covered jurisdictions to remedy a constitutional violation would result in a circumvention of the Section 5 preclearance provisions by way of a federal court order. Covered jurisdictions "operating under unconstitutional apportionment schemes would have a disincentive to redistricting themselves, since they could avoid complying with Section 5 simply by awaiting suit and proposing a new reapportionment plan to the district court." *Amicus Curiae* Brief at 16.

[28] In fact, the district court in its December 20, 1994, Order referred to the retrogression standard as a reason for not implementing an at-large election as part of a temporary election plan: "[T]his court is reluctant to consider a single district, countywide election plan as a temporary remedy in light of the supported stipulation that such a plan would be retrogressive in terms of Latino voting strength." Jt. App. 130, n. 4.

used in the June 6, 1995, special judicial election, received Section 5 preclearance on March 6, 1995. Consequently, the appropriate benchmark for evaluating any subsequent court-ordered plan is the temporary district election plan previously approved pursuant to Section 5.[29] When measured against the previous plan, the November 1, 1995, court-ordered at-large election plan is retrogressive. The previous Section 5 approved plan contained two election districts each consisting of a 52% Latino eligible voter population. J.S. App. 89. The November 1, 1995, court-ordered election plan consists of a single countywide election district where the Latino eligible voter population is 17% of the eligible voter population for the County. J.S. App. 91. A reduction in Latino eligible voter population from 52% to 17% constitutes retrogression.

The court-ordered plan is also retrogressive when measured against the election plan in place on November 1, 1968, the date of Section 5 coverage for the County. Under the 1968 judicial district configuration, there were three judicial districts each having at least a majority of Latino eligible voters.

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[29] The federal regulations governing the administration of Section 5 state that the appropriate comparison is the "last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54(b). Clearly, the "last legally enforceable" plan was the election plan used in the June 6, 1995, special judicial election, which received Section 5 preclearance. *See State of Texas v. United States*, 785 F.Supp. 201, 204 - 205 (D.D.C. 1982) (court-ordered temporary plan is appropriate comparison); *State of Mississippi v. Smith*, 541 F.Supp. 1329, 1333 (D.D.C. 1982) (new plan must not result in retrogression when compared to court-ordered plan), *appeal dismissed*, 461 U.S. 912 (1983); *State of Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979) (court-ordered plan is the new benchmark for comparison), *sum. aff'd*, 444 U.S. 1050 (1980).

Appellee State of California Motion to Dismiss or Affirm, Appendix 14a (Gonzales - 54%; Greenfield - 51%; Soledad (excluding prison population) - 62%).

Finally, if there is no plan available for purposes of conducting a retrogression analysis, the appropriate measuring benchmark then becomes a plan which fairly reflects the voting strength of the minority voting community. *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978). A fairly drawn plan would have to consist of judicial districts since in 1968 judicial election districts in the County were reflective of the State's policy preferences, which are not the subject of any judicial challenge. In formulating a court-ordered plan, a federal district court will defer to such policy preferences. *Upham*, *supra*, 456 U.S. at 41 - 42. The fairly drawn judicial district plan would contain at least two predominantly Latino judicial districts given the Latino population concentrations in Monterey County. J.S. App. 94 - 95 (Stipulation No. 5 - Hispanic Origin population concentrations for selected cities and areas ranging from 50.6% for the City of Salinas to 89.5% for the City of Soledad); J.S. App. 95 (Stipulation No. 6 - Hispanic Origin population is geographically concentrated). When compared to such a fairly drawn election plan, the at-large election system is also retrogressive.

B. The District Court Failed Even to Examine Whether Its Court-Ordered Remedy Might Violate Section 2

A court-ordered plan must itself not result in a violation of Section 2 of the Voting Rights Act.[30] *See*, *e.g.*, *Edge*, *supra*,

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[30] Even though Appellants could not challenge the at-large plan pursuant to Section 2 until Section 5 approval was

775 F.2d at 1510 ("We agree with both the appellants and the submission of the United States as *amicus curiae* that the district court could not validly adopt a reapportionment plan without determining whether the plan complied with Section 2 of the Voting Rights Act ...."); *Jordan v. Winter*, 604 F.Supp. 807 (N.D.Miss. 1984) (district court evaluated court-ordered plan pursuant to Section 2 analysis), *aff'd sub nom.*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

In the instant case, the district court should have conducted a hearing to determine whether its proposed court-ordered countywide election system violated Section 2. *Edge*, *supra*, 775 F.2d at 1511 ("[A] hearing is necessary to determine whether the court's plan complies with Section 2."). Such a hearing would have given the parties and the district court an opportunity to review and evaluate the following stipulations filed by the Appellants and the County which were relevant to a Section 2 determination: 1) the Latino community was sufficiently geographically compact to create a district which contained at least a 50% Latino eligible voter population, J.S. App. 94 - 95 (Stipulation Nos. 5, 6, 7); 2) the Latino communities in the County were politically cohesive, J.S. App. 95 - 96 (Stipulation No. 8 a); 3) there was Anglo bloc voting which defeated the voting preferences of the Latino community, J.S. App. 96 (Stipulation No. 8 b); 4) there were instances of discrimination against Latinos affecting their right to register, vote, and participate in the political process, J.S. App. 97 - 99 (Stipulation No. 9); 5) the County implemented a numbered place system for electing municipal court judges which impaired the opportunity of Latinos to elect candidates of their choice, J.S App. 99 (Stipulation No. 10); 6) the Latino community is

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secured, a district court has an independent obligation to assure that its court-ordered remedy does not violate Section 2.

affected by certain socioeconomic factors in education, language, employment, health, and housing, which may hinder their ability to effective participation in the political process, J.S. App. 99 - 103 (Stipulation No. 11); and 7) prior to the filing of this action, not a single Latino had ever been appointed or elected to the County's municipal court, J.S. App.103 (Stipulation No. 12).

These stipulations, which have not been contested by any party, clearly suggest that a countywide election system would operate to deny Latinos an equal opportunity to participate in the political process and elect candidates of their choice. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This evidence is particularly compelling since there is no countervailing state policy justifying the use of a countywide election system in the face of a potential Section 2 violation. Jt. App. 133 - 135 (district court found "no strong public policy" supporting strict linkage between a municipal court judge's electoral and jurisdictional bases). Given these stipulations, the district court should have conducted an evidentiary hearing to determine whether its proposed remedy conformed to Section 2.

C. The District Court Failed to Adhere to This Court's "Strong Preference" for Single-Member Districts

This Court has "repeatedly reaffirmed" that in fashioning remedies for voting rights violations, single-member districts should be preferred over multimember districts: "Among other requirements, a court-drawn plan should prefer single-member districts over multimember, absent persuasive justification to the contrary." *Wise*, *supra*, 437 U.S. at 540, *citing*, *inter alia*, *Connor v. Johnson*, 402 U.S. 690, 692 (1971). Pursuant to this principle, single-member districts are to be preferred unless the district court can articulate " 'a singular combination of unique

factors' that justifies a different result."[31] *Connor v. Finch*, *supra*, 431 U.S. at 415 (1977), *quoting Mahan v. Howell*, 410 U.S. 315, 333 (1973).

Even an historic policy of not fragmenting counties in the formulation of redistricting plans should not deter a district court's preference for single member districts. *See Connor v. Finch*, *supra*, 431 U.S. at 415 ("The defendants' unallayed reliance on Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting . . ."). *See also Connor v. Johnson*, *supra*, 402 U.S. at 692 (single-member plan must be implemented "absent insurmountable difficulties"); *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (reversing multimember plan adopted by district court, noting that "when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances").

The soundness of this Court's preference for single-member districts should not have been disregarded by the district court. No "persuasive justification," "unusual circumstances," or "insurmountable difficulties" in creating a single-member plan have been shown here.

CONCLUSION

The district court's November 1, 1995, Order implementing a voting change which has not secured Section 5

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[31] "[T]he general preference for single-member districts in court-ordered plans" applies even when "no allegation of minority group discrimination is raised." *Chapman v. Meier*, 420 U.S. 1, 20 (1975).

preclearance as part of an interim court-ordered election plan should be reversed. The district court cannot provide a temporary remedy to cure a Section 5 violation by implementing a method of election that also violates the substantive standards of Section 5 of the Voting Rights Act.

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